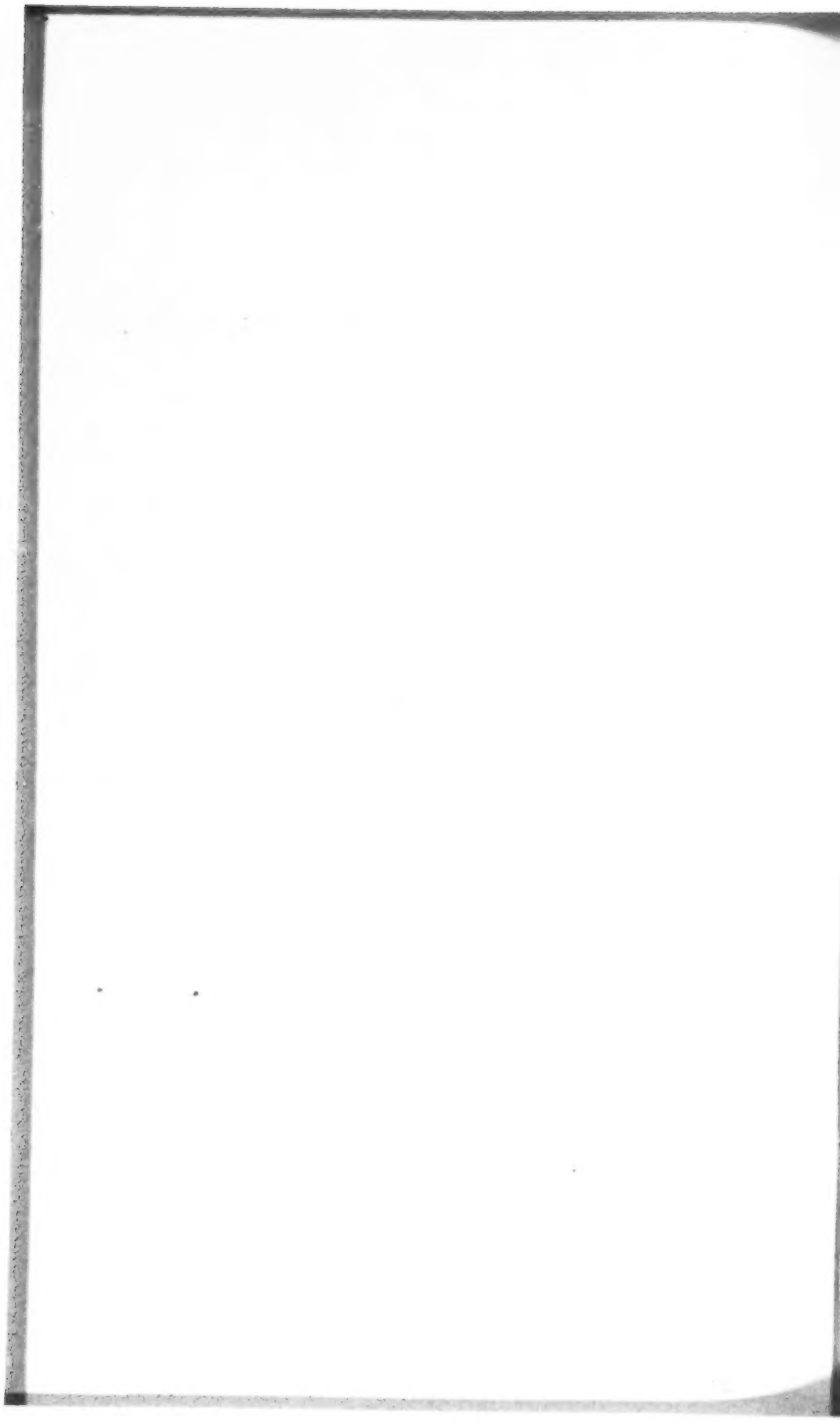


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No. 227.

Brf. of Boynton for Appellees.

SUMMARY OF THE BRIEF.

Filed Mar. 15, 1902.

Page 1. Statement of the points discussed.

Pages 2-5. Statement of the action taken by the State Board of Equalization and the statutes applicable thereto.

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(a.) As to any right, question or fact directly in issue.

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(c.) As to the effect of the express adjudication that the same issue had been conclusively determined by prior adjudications.

Supreme Court of the United Statse.

No. 227.

MARCELLUS A. LANDER, AS TREASURER OF CUYAHOGA COUNTY, OHIO, APPELLANT.

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, APPELLEE.

BRIEF OF APPELLEE.

The question arising in the present case is, did the Circuit Court of Appeals err in reversing the judgment of the Circuit Court and remanding the cause to the latter court for further proceedings in accordance with the opinion of the Circuit Court of Appeals?

By its bill of complaint the appellee, The Mercantile National Bank of Cleveland, sought (1) to restrain the collection by the treasurer of Cuyahoga County, Ohio, of that portion of the taxes levied against its shareholders in 1897, upon the addition of $123,000 made to the valuation of its shares of stock by the State Board of Equalization for that year, on the ground that such addition was void because made without notice to the bank, or to any of its officers or stockholders named in the bill, on the ground that such stockholders was wrong; and further sought (2) to enjoin the collection of the tax of 1897 levied against shares of its stock held by certain individual stockholders named in the bill, on the ground that such stockholders were entitled, in fixing the valuation of their respective shares for taxation, to deduct their bona fide debts from such valuation; that to refuse such deduction would violate the provisions of section 5219 of the Revised Statutes of the United States which restricts the rate of taxation on shares of national banks to that assessed upon other moneyed capital in the hands of individual citizens of the state; alleging that under the facts set out the refusal to allow such deduction resulted in an unlawful and unjust discrimination against the shares of stock so held by them. The bill alleged that the shareholders aforesaid were entitled to such deduction on the further ground that their right

thereto had theretofore been adjudicated in their favor by the Circuit Court of the United States for the Northern District of Ohio, in causes between the bank and the treasurer of said County in which identically the same claim was asserted and in issue, as to the tax on their shares for the years 1886, 1887,1889 and1893, and that said adjudications are in full force and operation, and between the same parties, and involved the same subject matter.

The Circuit Court of Appeals decided both these questions in favor of the apellee, holding the addition of $123,000 to the valuation of the County Auditor without notice to the bank of the hearing at which the increase was made, was without authority of law and void; and on the second question, that the former judgment or decree of the Circuit Court rendered in the action brought in 1893 concluded the question of the right of the appellee's stockholders to a deduction of their bona fide debts in the assessment of the value of their shares for taxation.

We will discuss these two questions in the order here given. The conceded process by which bank shares are valued for taxation, in Ohio, is as follows: The cashier of the bank is required by the statute, section 2765, to make out and return to the auditor of the county in which the bank is located, between the first and second Monday of May, annually, a report in duplicate under oath, exhibiting in detail and under appropriate headings the resources and liabilities of such bank at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each and the par value of each share. By the next section it is provided that the auditor, upon receiving such report, shall fix the total value of the shares of such banks according to their true value in money, and deduct from the aggregate sum so found, the value of the real estate included in the statement of resources as the same stands on the duplicate." Thereupon he is required to make out and transmit to the annual state board of equalization for incorporated banks, a copy of the report so made by the cashier, together with the valuation of such shares so by him fixed. The entire jurisdiction and power of the state board of equalization for banks are created by sections 2808-9-10, Revised Statutes of Ohio, which are as follows:

"Section 2808. The Governor, Auditor of State and Attorney General shall constitute a board for the equalization of the shares of incorporated banks, and for this purpose they shall meet on the third Tuesday of June, annually, at the office of the Auditor of State, and examine the returns of said banks to the county auditors, and the value of said shares as fixed by the county auditors as the same shall have been reported by the county auditors to the State Auditor."

"Section 2809. Said board shall hear complaints and equalize the value of said shares *according to the rules prescribed by this title for valuing and equalizing the values of real and personal property*, and if in the judgment of the board, or a majority of them, the aggregate value of all the bank property so reported to said board by the county auditors is below its true value in money, they may increase or diminish the value of said shares by such per cent. as will equalize said shares to their true value in money; provided that said board shall not

increase or reduce the grand aggregate value of bank shares as returned by the several county auditors by more than twenty (20) per centum."

"Section 2810. The Auditor of State shall, forthwith after such equalization shall have been made, certify to the auditors of the proper counties the valuation, as equalized, of the shares of banks situated in such counties, which valuation shall be put on the proper tax list."

Here it will be seen that the state board, composed of the Governor, Auditor of State and Attorney General, is required to meet on the third Tuesday of June annually, at the office of the Auditor of State and examine the returns of the banks to the county auditors, and the value of said shares as fixed by the county auditor as the same have been reported by the county auditors, and to hear complaints and equalize the value of said shares, "according to the rules prescribed by this title," (title 13 of the Revised Statutes of Ohio) "for valuing and equalizing the values of real and personal property."

According to the finding of the master and conceded state of facts, the board assembled on the day named in section 2808, namely, the third Tuesday of June, 1897. The following are the 7th and 8th findings of the master which cover the action of the state board complained of:

Seventh. That the said board of equalization for incorporated banks, composed of the Governor, Auditor of State and Attorney General, convened on the third Tuesday, being the 15th day of June, 1897, at the office of the State Auditor, as required by section 2808 Revised Statutes of Ohio, and organized by the election of the Governor as president of the board and G. W. Taylor, chief clerk, in the office of the Auditor of State, as secretary, and adjourned at the call of the secretary transacting no other business at that meeting; that the members composing said board next met on the 7th of September, 1897, but took no action relating to the valuation of the shares of the plaintiff, and adjourned; that two members of said board with said secretary met on the 10th day of September, 1897, but took no action relating to the bank shares of the plaintiff's bank, and adjourned; that on the 20th day of September, 1897, the members of said board met but took no action relating to the valuation of the shares of plaintiff and adjourned; that on the 4th day of December, 1897, the members of said board next met at the call of the State Auditor to consider unfinished business. The record of the meeting of said board as originally made by the secretary shows that at the meeting held June 15, 1897, the board "adjourned to meet at the call of the secretary." That at the meeting of September 7, 1897, September 10, 1897, September 20, 1897, the "board adjourned." At the meeting held December 4, 1897, the secretary was directed to amend the record as to each of said above-named adjournments by adding these words, "Amended to read, adjourned to meet at the call of the president of the board, Asa S. Bushnell, Governor of the State," and thereupon said board adjourned sine die. Some time after December 4, 1897, the record was amended by the secretary as directed by said board. At none of said adjournments was a day named for the next meeting.

Eighth. At said meeting on December 4, 1897, without complaint from any one, the members of said board assuming to act as a board, increased the valuation of the shares of the plaintiff from $519,320.00,

so fixed by the auditor, to $042,320.00, and on the sixth day of December certified said valuation to the auditor of Cuyahoga County, "to be by him placed on the treasurer's duplicate, which was accordingly done; that neither of said meetings of the members of said board following the third Tuesday of June, 1897, was called by said secretary; and no notice or information of any kind, or opportunity to be heard, was given by said board, its secretary or any other person to said bank or any of its officers, directors or shareholders of any or either of said meetings, except such as the statute gave them, to wit; section 2808 Revised Statutes and succeeding sections; nor did they or either of them have any notice of any of said meetings or appear thereat, and the first information that said bank or any of its shareholders had or received of any action of the board or of its purpose to increase the value of the shares so fixed by the auditor was on the 7th day of December, 1807, after the action of the board was had and such information was conveyed by letter from the auditor of the county to the cashier of the plaintiff, notifying him of the completed action of the board; that thereupon said bank and its shareholders through the officers and agents of the bank duly authorized, applied to the members of said board for a hearing, and were notified that two of the members of said board were out of the State, and that December 28th was as early as the bank officers could be received; that on said day the officers of said bank on behalf of said shareholders duly authorized, met the members of said board at Columbus, and made application for a hearing respecting the valuation of said shares and the action of said board, and notified said members of said board that such increase made on the shares of said bank was excessive and unwarranted, and protested against the same, but said hearing was denied, the members of said board declaring that the board had adjourned *sine die* and could not reconvene as a State board of equalization for banks to consider any claim or application respecting the value of said shares."

This finding shows that no notice whatever was given to the bank, or to any of its officers or stockholders, of the meeting at which the increase of the bank's valuation was made. This omission to give notice of the meeting of the board when action was to be taken, and was taken, we claim to be fatal to the action of the board in increasing the valuation fixed upon the shares by the county auditor. In the first place, "The rules prescribed by this title, (title 13) for valuing and equalizing the values of real and personal property" by which the board was bound, explicitly required notice to the property owner of the meeting at which the action of the board was to be had; and secondly, to deny notice of such a hearing and an opportunity to be heard, would be to deprive the owner of his property without due process of law.

Title 13 of the Revised Statute of Ohio embraces the sections from 2730 to 2915 inclusive. Section 2804 provides that the annual county board, "shall not increase or reduce the valuation of any real estate except in cases of gross inequality, and then only upon reasonable notice to all persons directly interested and an opportunity for a full hearing upon the question involved."

The same requirement is provided by the same section for the valuation of personal property. Section 2804a relates to the notice and

provides "that the notice provided for in section 2804 shall describe the real estate whose tax is to be acted upon by the description thereof in the tax duplicate in the current year."

Section 2707 gives to the boards power to hear complaints and to equalize the assessments of all personal property, moneys, credits, etc., with power to add to or deduct from the valuation of the same as returned by the assessor or county auditor upon such evidence as shall be satisfactory to said boards, provided "that no such addition shall be made to such list returned under oath without the board having first given reasonable notice to the person or persons whose personal property is sought to be added to, or the valuation thereof increased, to appear before said board at a time and place to be fixed by said board and show cause why such additions should not be made, or why such valuation should not be increased."

Section 2782 requires the county auditor to inquire into returns that he may suspect to be wrong, but in such cases provides that, "it shall be the duty of the auditor in all such cases to notify every such person before making the entry on the tax list and duplicate, that he may have an opportunity of showing that his statement or the return of the assessor was correct."

From these provisions the duty of the state board of equalization for bank shares to give notice of its meetings when the time thereof has not been fixed at the date of the adjournment, is perfectly obvious. Without such notice the board had not the slightest jurisdiction to proceed to increase the valuation of bank shares. To do so without such notice would not only deprive the tax payer of his property without due process of law, but would be in express violation of the provision of the statute requiring notice to be given to the property owner. In *Champaign County* vs. *Smith*, 7 O. S. 42, the Supreme Court of Ohio, giving construction to the clause above quoted from section 2782 of the Revised Statutes held: "That the tax cannot be increased without first giving notice to the party and affording him an opportunity of showing that the previous valuation was correct."

Judge Scott, in delivering the opinion of the court on this point, says:

"We cannot regard the provision of the statute requiring notice as directory merely. It is not a matter of form only, but of substance. Where a statement of property subject to taxation has been made out and verified by the oath of the party and returned to the proper office.....it cannot be that the legislature intended to put it in the power of the Auditor to increase this amount without notice to the party interested. We apprehend the provisions of the statute as to the issuing and service of a summons to bring a defendant into court in a civil action, are not simply directory, and that a substantial compliance with them is essential to the validity of the subsequent judgment. But the assessment of the tax affects as vitally the rights and interests of the party assessed as the rendition of a judgment against him. Indeed, the collection of the former is much more summary in its mode under the law of 1853 than the ordinary process of execution upon the latter. The language of the statute is: "It shall be the duty of the Auditor in all such cases to notify every such person before making the entry upon the duplicate that he may have an opportunity of showing

that his statement or the return of the assessor was correct. 'Until this notice be given the auditor has *no jurisdicton* of the party, and can, therefore, make no valid assessment against him, however perfect and full may be his jurisdiction of the subject matter. The party interested has a clear right to a hearing and a day in court, as well by the express terms of the statute as by the plainest principles of justice.'"

This being the construction given by the Suprene Court of the State to a State statute, if not controlling here, is of great weight upon the question decided.

In *Windsor* vs. *McVeigh*, 93 U. S. 274, the court speaking through Mr. Justice Field, after quoting from *McVeigh* vs. *United States*, 11 Wall., 259, the expression of Justice Swayne that it would be contrary to the first principles of the social compact and of the right administration of justice to give judgment without hearing, said:

"The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Whenever one is assailed in his person or his property there he may defend, for the liability and the right are inseparable. This is a principle of natural justice recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."..... and "denial to the party of the benefit of the notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether."

Speaking of this decision, this court in *Hovey* vs. *Elliot*, 167 U. S. p. 415, by Mr. Justice White, said:

"This language but expresses the most elementary conception of the judicial function."

In *Rees* vs. *City of Watertown*, 19 Wall., 107 the court say:

"Whether in fact the individual has a defence, is not important. To assume that he has none, and therefore, that he is not entitled to a day in court, is to assume against him the very point he may wish to contest."

This language was quoted with approval in *Louisville & Nashville Ry. Co. vs. Schmidt*, 177 U. S. 239. So in *Simon* vs. *Craft*, 182 U. S. 427, it was said at page 437:

"*If the essential requisites of full notice and an opportunity to defend*, were present, this court will accept the interpretation given by the state court as to the regularity under the state statute of the practice pursued in the particular case."

The action of the State Board of Equalization for banks complained of, was before the Circuit Court of the Eighth Ohio Circuit in the cases brought by the state banks to enjoin the tax on the increase of valuation of their shares without notice at this very December 4th meeting, and the tax was enjoined for want of jurisdiction by the board to increase the valuation, the same having been done without notice to the bank. The judgment of the court was so satisfactory that the cases went no further, although there were thirteen of them. *Euclid Avenue Savings & Banking Co.* vs. *Hubbard, Treasurer*, 22 Ohio Circ. Ct. 20.

We refer the court to the case of *Perkins* vs. *Zumstein, Treas.*, 4 *Ohio* Circ. Ct. 371, and *Britt* vs. *Hagerty, Auditor,* 11 Ohio Circ. Ct. 115, where it was held:

"That a board of review cannot make any addition to the taxable value of real estate until the owner has been served with a notice of its intention so to do, and the statutory requirements for service must be strictly pursued."

In these cases the treasurer was enjoined from collecting the tax assessed on the addition of the board of review. Notwithstanding the question seems thoroughly settled by the foregoing adjudications, that the state board of equalization for banks at its meeting on the 4th of December, 1897, had no jurisdiction to act, having given no notice to the bank, we refer to other adjudications and elementary authorities for the purpose of showing that the principle underlying these decisions, denying jurisdiction to the board to act without notice, is of universal application.

In section 114 of *Desty* on *Taxation*, the author says:

"The sessions of the board must be held at the time and place appointed by statute, when they may examine the owners of property under oath, and may make such additions of omitted property as justice may demand, but not without affording to the tax payer an opportunity to be heard, and giving him the notice to appear before the board."

In *State* vs. *Harrison*, 39 N. J. L., 55, it was held:

Statutory provisions to secure notice to individuals, whose rights are to be affected, must be strictly complied with. In the absence of the requisite notice, proceedings of this character cannot be upheld."

And it can make no difference whether the notice is required by the statute, or whether it is required by the common law. In our case it is required by both.

In *Commissioners* vs. *N. Y. Mining Company*, 76 Md., 551, the court held:

"Until the property owner is duly notified and given an opportunity to be heard on the valuation, the board *has no power or authority to increase the valuation of the property already valued.*

In *Slaughter* vs. *Louisville*, 89 Ky., 112, held:

"Where the board failed to meet as required by law, the increase is invalid."

It certainly can make no difference whether the board failed to meet on the third Tuesday of June, or whether meeting that day they indefinitely adjourned without taking action, and took that action upon a day of which the owner of the property was not notified.

In *Cooley on Taxation*, page 365, the author says:

"Whatever statutory provisions are made for notice and hearing must be regarded, under the rules of construction already given, as mandatory. A compliance with them in all essential particulars should, therefore, be held a condition precedent to any further proceedings. It is not enough to sustain a tax under such circumstances that the officers *have acted with just intent*, or even that the assessment is *relatively fair*, the conclusive answer to any suggestion of the kind is, that the party has been denied his lawful right to meet such a claim at the proper time."

"When, therefore, either directly by the statute or by some officer or board under its authority, a certain time is fixed for a meeting of a Board of Review, and the board fails to meet, or a certain time for the return and filing of the assessment for the inspection before the meeting of the board and it is not filed, whereby inspection is lost, the tax proceedings must be regarded as having failed to become effectual because of the failure of the officers to properly follow them up as required by law. *No argument can be admissible in such case which proposes the acceptance of something as a substitute for the securities the statute provides.*"

While the author is speaking of failure to meet, the rule, *ex necessitate*, is the same, where they meet upon an appointed day and take no action relative to the increase, and adjourn without day, giving no notice of the day on which they take their final action. In the present case we particularly complain of the failure to give us notice of the meeting on the 4th day of December, that being the day on which they took the action relating to the appellee. We care very little about the three September meetings, although we had no notice of them, because they did not affect us by any action the board took. But on the 4th of December it took action, and intended to take it, because their record shows that they called the board together to dispose of unfinished business, and the unfinished business related to nearly all the banks of the State, and particularly to the Cleveland banks. And knowing that they were to take up the valuation of the Cleveland banks on that day, notice of that meeting was especially required before its action could bind.

In *Burrows on Taxation*, 237, it said:

"Boards of equalization are vested with special powers, and their record must show all facts necessary to give jurisdiction."

In the present case the record not only fails to show facts necessary to give jurisdiction over the bank on the 4th of December, 1897, but the testimony conclusively shows that they did not have jurisdiction.

In a note at page 422 it is said:

"If a Board of Equalization raises the assessment without jurisdiction, *its action is void.*"

At page 751, *Burrows on Taxation*, it is said:

"If the board by law is required to meet at a certain specified time, and it meets at another at which the tax payers have neither actual nor constructive notice to appear, its action at such time *is unauthorized and void.* And so it will be if the statute requires notice to be given of its meetings, and the records of the board show no notice."

In *Jewel* vs. *Van Steenburgh*, 58 N. Y., 85, in the discussion of the question as to whether notice was essential to jurisdiction, the Court say:

"It seems to me *clear that it is.* This is the only mode by which persons interested can have an opportunity to be heard. It is in the nature of process to bring them into court, and it must precede the power of the trustees to act upon the subject. In the first instance the assessors may exercise their own judgment as to who are taxable persons and the kind and value of the property to be taxed; but this is preliminary to the final adjudication. Before that can be

made, the persons to be taxed are to have a hearing and it cannot be made until an opportunity for such hearing is afforded. As well might a justice of the peace render judgment against a party without the service of process."

In *Lewis* vs. *Bishop* (Wash.) 53 Pac. Rep., 165 where objection was made to the granting of the relief on the ground that it did not appear, nor was it claimed, that the property in question was assessed at a higher rate than adjoining property, the Court say:

"The statute in accord with the spirit of the constitution contemplates that the property owner shall have the right to be heard before the value of his property, as fixed by the assessor, is raised, and it is not a justification of the action of the Board of Equalization in raising the assessment without notice, that the conclusion reached by them was fair and accords with substantial justice."

In the light of the above cases, aside from the statute, the action of the State Board of Equalization for bank shares on December 4, 1897, was clearly void. The meeting was not only without notice to the bank or its shareholders, but was held behind closed doors long after both bank and its stockholders had the right to assume and believe that the duplicate was in the hands of the treasurer and the taxes levied for the current year being collected. Section 1042 of the Revised Statutes of Ohio provides:

"That the auditor shall annually before the first day of November, deliver to the county treasurer a true copy or duplicate of the books containing the tax list required to be made by him for the year."

The bank had the right to presume that the duplicate was in the hands of the treasurer for collection long before December 4th. A hearing upon application duly made was denied. We could not obtain a hearing to make application to have the matter opened until the 28th day of December, eight days after the first half of the taxes for the year was required by the statute to be paid, the statute requiring the first half of the taxes in Ohio to be paid on or before December 20 and the remaining half on or before June 20, following. The action of the State Board of Equalization was at best a slovenly performance of official duty materially affecting the rights of another without giving that opportunity to be heard which the law requires in all cases.

II.

RES ADJUDICATA.

The second question is, did the Circuit Court of Appeals err in holding that a former adjudication established the right of the bank shareholders to deduct their legal bona fide debts from the value of the shares in determining the amount for which the shares should be listed for taxation. The Court held that the judgment of the Circuit Court in 1893 in the case of the present appellee *National Bank* vs. *Joseph C. Shields*, treasurer, estopped the defendant from denying the right of the shareholders to the deduction claimed; but expressed the opinion, that, the judgment in the case of the *apellee* vs. *Whitbeck*, decided in 1887, created no estoppel. Respecting the

adjudication in 1887 between the appellee and Whitbeck, treasurer, the learned Circuit Court of Appeals fell into a vital error; and while it is not necessary for us in maintaining our right to the judgment given, to question the court's reasoning upon the effect of the judgment in the Whitbeck case, the conclusion reached is so far unsupported by the actual facts, and so far arises out of a misconception of what judgment creates the estoppel where one arises, as to justify a re-statement of the facts bearing upon the point as they were presented to this court when the Whitbeck case was decided. The Circuit Court of Appeals assumed that the decision of *this* court in *Whitbeck* vs. *The Mercantile National Bank*, 127 U. S. 193, affirming the judgment of the Circuit Court, was the adjudication relied on, and to be relied on, as establishing the estoppel claimed to arise from the judgment in that case, and as a predicate for denying the estoppel, the court said that this court in the Whitbeck case decided a proposition not made in the bill, and not set forth in the certificate of division. It is our purpose here to show that this statement is wholly incorrect, leaving the effect of that judgment for consideration in connection with the judgment in the later cases involving the same question. In speaking of the Whitbeck case the Court say: (Record p. 465.)

"The question made in the bill was, whether the deduction of indebtedness from a limited class of capital as defined in the Ohio Statute was an unlawful discrimination. The proposition decided by the Supreme Court was, assuming the Ohio Statute to be different from what the bill declared it to be, and that it provided that moneyed capital, with the single exception of national bank shares, might have such deduction, it afforded an unlawful discrimination against such shareholders within the meaning of the Federal statute. In other words, the Supreme Court decided the question upon an erroneous assumption, not based on the allegations in the bill of complaint or certified in the questions submitted. The general decree in favor of the bank in that case can be supported by the unlawful discrimination in the increased valuation of the shares of the bank. The real question made under the statutes of Ohio, as they in fact existed, was not passed upon by the Supreme Court of the United States in that case. We think we have a right to look to the opinion to ascertain what was decided by the Supreme Court. Closing the same Mr. Justice Miller says: "These principles require the affirmance of the decree of the circuit court; and while there will be found in them a sufficient answer to the questions certified by the judges of that court, we do not think it necessary to make a more specific answer to each of them. The decree is affirmed."

"The decree could stand under the finding, in favor of the bank upon the other proposition. We think the Supreme Court has decided a proposition not made in the bill, and not set forth in the certificate of division of opinion. While it is said in that certificate that the laws of Ohio make no provision for deduction of debts by shareholders of national banks, there is no statement that such holders are the only owners of money capital not entitled to such deduction."

The court then quoting from *Bank* vs. *Chapman*, 173 U. S. 219, among other things the expression, that in the Whitbeck case "the Court assumed that under the statute of Ohio owners of all moneyed capital other than shares in a national bank were permitted to deduct their bona fide indebtedness from the value of their moneyed capital."

Concluded by saying:

"In view of the foregoing comments on the decision in the Whitbeck case, and the erroneous assumption therein of the character of the Ohio statute, we are not prepared to say that the judgment of that case was *res adjudicata* as to the rights of complainant stockholders to deduct their debts from the shares of national bank stock."

That this conclusion was founded on a misconception of what record and judgment constituted the estoppel respecting the thing adjudicated, we shall show hereafter. The court was utterly wrong in the position that this court assumed in deciding the Whitbeck case that under the Ohio statute the owners of all moneyed capital other than shares in a national bank, were permitted to deduct their bona fide debts from the value of their moneyed capital. There not only is nothing in the opinion of Mr. Justice Miller showing such assumption, but to make such assumption would subject the court to the imputation of deciding a question depending on the construction of a state statute without having that statute before it. More than this, it would also subject counsel on both sides to the imputation of presenting a case to the court for decision involving the construction of a statute without placing that statute before it. To show that the fact was exactly the opposite of what is intimated, we reproduce the section as printed in the brief of Whitbeck for the purpose of showing not only that the statute was before the court, but that the moneyed capital from which the debts may be deducted was therein defined as *credits*, and that the same section defined all other moneyed capital subject to taxation from which there was no claim that deductions were allowable, and from which it was perfectly obvious deductions were not provided for. The following is the section found on page 36 of the brief of Whitbeck:

Sec. 2730.....the terms, "investments in bonds" shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidence of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States, held by persons residing in this state,.....; the terms "investments in stocks," shall be held to mean and include all moneys invested in the capital or stock of any association, corporation, joint company, or other company, the capital stock of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing in this state.....; the terms "personal property" shall be held to mean and include, first, every tangible thing the subject of ownership, whether animate or inanimate, other than money, and not forming part of any parcel of real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming

part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits, or means, by whatsoever name the same may be designated.....; third, the money loaned on pledge or mortgage of real estate, although a deed or other instrument may be given for the same, if between the parties the same is considered as security merely; the term "money" or "moneys" shall be held to mean and include any surplus or undivided profits held by societies for savings or banks having no capital stock, gold and silver coin, bank notes of solvent banks, in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw, in money on demand; the term, "credits" shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money) *over and above the sum of legal bona fide debts owing by such person;*.....and no person shall be required to take into account in making up the amount of credits, a greater portion of any credits than he believes will be received or can be collected, or any greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease and remain unpaid:....."

In this section the court had before it in the Whitbeck case, the entire legislation of the state defining moneyed capital subject to taxation, explicitly showing that debts could not be taken from investments in bonds, corporate or municipal, certificates of indebtedness by corporate bodies, nor from investments in stocks. To say that the court assumed that debts could be taken from all moneyed capital is to say that it did not familiarize itself with the very statute on which the point to be decided turned, having that statute before it, with a thorough argument upon the question by counsel. Moreover, the very question certified, contained the information that debts could only be taken from what the statute denominated credits. The court could not have answered the certified question relating to the deduction of debts from the value of the shares without reading the section, and it could not read the section without discovering, at once, that legal *bona fide* debts could not be taken from investments in bonds or stocks. These facts ought to be regarded as satisfactorily demonstrating that the court did not overlook the statute.

But, aside from this, the learned Circuit Court of Appeals seems to have entertained the notion that the decision of this court in the Whitbeck case on the question certified up for decision, was the adjudication to be relied on as creating the estoppel as to the thing adjudged. This clearly is a misconception of the record and judgment that create the estoppel.

The binding judgment—the one creating the estoppel is the one rendered in and by the Circuit Court—the judgment pronounced on the facts found. The Federal statute provides that where the Circuit and District judges differ on a question before them, where both sit at the trial in the Circuit Court, effect shall be given to the judgment of the

Circuit Court judge. The Circuit Court entry in the Whitbeck case found all the allegations of the petition to be true and carried that finding into the decree, (Record p. 65) and the decree was entered at the conclusion of the trial long before the hearing by this court on the certified questions. That judgment has never been disturbed. The judgment of affirmance by this court added nothing to its efficacy or effect, nor did it take anything from it. Unless the judgment of the Circuit Court is reversed it stands in full force. The party against whom the judgment is given below is the appellant, or plaintiff in error, the actor, moving the reviewing court to reverse the judgment, and if he fails, as was said by Chief Justice Taney, in *Brown* vs. *Ashen*, 14 How. 28, "The judgment or decree necessarily stands;" the judgment already of record. In *Durant* vs. *Essex Company*, 7 Wall 107-112, the court, speaking by Mr. Justice Field, said:

"In cases of appeal or writ of error in this court, the appellant, or plaintiff in error, is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment or decree be reversed? If the judges are divided the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such cases to enter a judgment of affirmance. But this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that court can proceed to enforce *its* judgment. The legal effect would be the same, if the appeal, or writ of error, were dismissed."

The principle here stated is decisive of the question that the judgment of the Circuit Court was the one that carried into adjudication the ground or fact upon which recovery was had. It is now uniformly held, where the issues are made by the pleadings, that the question is, what did the court in effect decide as shown by the record and judgment? *Potter* vs. *Wagner*, 36 O. S. 47, and this necessarily means the judgment of the court pronouncing the decree—the court that hears the evidence and ascertains the facts and carries them into judgment. It is the verdict or finding with the judgment of the court upon it, which constitutes the *res adjudicata*. Wells on *Res Adjudicata*, 296.

This is so firmly settled as the doctrine of estoppel by judgment, and so incontrovertible in principle, that no elaboration can make it plainer. Consequently, disregarding the judgment in the Whitbeck case as rendered in the Circuit Court on the grounds stated by the learned Circuit Court of Appeals, was, we respectfully submit, to overlook its binding effect as a judgment of the Circuit Court, covering all the allegations made by the bill. It was entirely inadmissible to predicate any ruling on the decision of this court in the Whitbeck case, in reaching the determination of what passed *in rem judicatam* by the decree of the Circuit Court in that case. While, as before stated it is not necessary to the maintenance of the correctness of the final judgment of the Circuit Court of Appeals for us to rely on the decree in the Whitbeck case, we insist that that decree is to be treated as if no appeal had been taken therefrom to this court, and further, that its affirmance left it with all the vigor and effect it had when entered by the Circuit Court.

III.

THE FORMER ISSUES.

We confidently claim that each of the decrees of the Circuit Court for the Northern District of Ohio in the cases of the present appellee against Whitbeck, Treasurer, (Record p. 184-210, 1888), and the present appellee against Kimberley, Treasurer, Record p. 241-245, 1889), and the present appellee against Shields, Treasurer, (Record p. 246-257 inclusive, 1893) is decisive of the correctness of the judgment of the Circuit Court of Appeals, that the appellee was entitled to the relief prayed for. In each of these cases the question of the right of the shareholders of the bank to deduct their bona fide indebtedness from the value of their shares, was directly involved and was decided in favor of the complainant. In the last or Shields case, the only question involved was the right to the deduction. In the first, the Whitbeck case, and the last, the Shields case, the court found all the allegations of the bill to be true, and gave judgment accordingly. In the second, or Kimberley case, the court specifically found (Record 245) that the shareholders were entitled to deduct their legal bona fide debts from the value of their shares and enjoined the collection of the tax on the amount equaling the indebtedness.

THE WHITBECK CASE.—JUDGMENT, RECORD P. 206.

In the first, or Whitbeck case, the bill was demurred to and the demurrer overruled. The treasurer then filed an answer taking issue with every material allegation in the complaint. In the bill of complaint it was, *inter alia*, averred:

"That in and by the act of Congress under which your orator is incorporated, the right of the state to tax any owners of its shares is made subject to the condition that the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the said state." That by section 2730 of the Revised Statutes of Ohio it is enacted that, "The term 'credits' shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or services due to or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state other than such as are held to be money as hereinbefore defined when added together—estimating every such claim or demand at its true value in money—over and above the sum of legal bona fide debts owing by such person."

"That the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him and required him to list for

taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the state, and that under the laws of the same state the owner of capital stock of your orator is denied the right to deduct therefrom his indebtedness, but he is required to list for taxation the whole number of shares owned by him, and not simply the excess of the value of said shares over his indebtedness, and your orator insists that such discrimination results in the taxation of your orator's stock at a much greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio."

Also that,

"A large amount of moneyed capital in the hands of individuals invested in promissory notes and other obligations and credits is by the aforesaid provision allowing deduction of legal bona fide debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares as to which no exception or deduction is provided for by the laws of the state, which discrimination is in direct violation of the restriction of said section 5219 of the Revised Statutes of the United States."

The bill after setting out the names of certain stockholders who claimed the right to deduct their *bona fide* debts from the value of their shares, further averred:

"That each of said above named shareholders was indebted and owing to others of legal *bona fide* debts, a sum in excess of the credits from which under the laws of Ohio he was entitled to deduct said debts to an amount equal to the value of said shares * * * which said excess of said debts over credits as aforesaid should be deducted from the assessed value of said shares so owned by him, and by reason of the facts above stated said shares of said stock should not have been placed on the tax duplicate, and no tax should have been assessed thereon * * * and your orator insists that by reason of the premises above set forth there should be deducted from the shares of capital stock owned by said shareholders above named and now standing on the tax duplicate of said county, $285,500, par value of the shares of said stock, in all the sum of $141,543.48, according to the assessed value thereof."

In the answer, besides the general denial, special denials were as follows:

"He (defendant) denies that any of the shareholders of said banking association at the times named in the said bill of complaint was indebted or owing to others of *bona fide* debts a sum in excess of the credits from which under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares or any part thereof. He denies that either of said shareholders was then indebted in any sum whatever, *or that even if any of them was so indebted as claimed in said bill of complaint, he is thereby entitled to deduct the excess of such indebtedness over his credits from the assessed value of his said shares*, or that for any reason said shares of stock should not have been placed on the tax duplicate and no tax assessed thereon. * * * He denies *that any sum whatever should be deducted from the valuation of the shares of the capital stock owned by said shareholders named in said bill of complaint.* He denies that the laws of

Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him or that such is the uniform practice throughout the state. He denies that the taxation of shares of said complainant's stock is at a much or any greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state. He denies that the necessary effect of the proceedings had in the assessment and levy of the tax standing against said complainant and the shares thereof owned by its said shareholders has been to deprive said complainant or said shareholders * * * of any security provided for them by the limitation of said Act of Congress."

Then follows a denial of each and every allegation in said bill of complaint "not hereinbefore admitted or expressly denied."

Under this issue the question of the right to deduction of indebtedness from the value of the shares was referred to a master under the following order:

"In this cause it is ordered that A. J. Ricks, because of his experience in matters of accounting, be appointed a special master to examine the evidence, and record, now on file, and report who, if any, of the shareholders of the complainant on the day preceding the second Monday of April, 1885, had *bona fide* indebtedness which should have been deducted from the valuation of the shares."

The Master reported as follows:

"By an order entered in this case the undersigned was appointed a special master to ascertain and report from the testimony and record who, if any, of the shareholders of the complainant on the day preceding the second Monday of April, 1885, had *bona fide* indebtedness which should have been deducted from the valuation of the shares of the capital stock of complainant bank. The master reports that, having examined the evidence and heard the claims of counsel, he *finds* and *reports* that all the shareholders *are entitled to deductions as charged in the bill*, except the following who should be taxed for the amount stated, viz: E. R. Perkins has credits subject to taxation, above his indebtedness on the day named to the sum of $4,374.40. C. L. Murfey has credits, subject to taxation, above his indebtedness on the day named to the sum of $724.00. Robert L. Chamberlain has credits, subject to taxation, above his indebtedness on the day named to the sum of $4,448.00. James Parmelee has credits, subject to taxation, above his indebtedness on the day named to the sum of $3,113.60. James Barnett has credits, subject to taxation, above his indebtedness on the day named to the sum of $17,792.00.

"All of which is respectfully submitted."

The case then came on for final hearing and the following decree was given upon the merits:

"At this term the parties appeared by their solicitors, and this cause came on for hearing upon the merits, and the court being fully advised in the premises from the testimony and exhibits and special master's report adduced in open court, *do find all the allegations of the bill to be true*, except those allegations which charge that James A. Barnett, Robert L. Chamberlain and James Parmelee were the owners of shares of capital stock of said bank from which they were entitled to deduct, respectively, an indebtedness of theirs, which allegations the court find are untrue; and it appearing to the court that the amount admitted in

said bill to be due to said respondent has, pursuant to a former order of this court, been paid by said complainant to said respondent and by him received; it is therefore ordered, adjudged and decreed that said respondent and his successors in office be forever enjoined from proceeding or attempting to collect or from collecting any part or portion of said tax or assessment remaining unpaid, except the taxes levied upon the valuation of the shares of capital stock of the complainant, as fixed by the County Auditor, owned by said Barnett, Chamberlain and Parmelee, amounting to $659.20, the amount of tax hereby enjoined being $3,967.55; and it is therefore ordered, adjudged and decreed that said respondent or his successors in office, pay the costs in this suit, to be taxed at $183.47, for which it is ordered that execution may issue as upon judgments at law."

On two principal questions a certificate of division was made for the opinion of this court (Record p. 209). The one relating to the right to deduction of debts from the value of the shares was as follows:

"Whether the taxation of national bank shares in the state of Ohio in the year 1885 without permitting the shareholder to deduct from the assessed value of his shares the amount of his *bona fide* indebtedness existing on the Wednesday next preceding the second Monday in May in 1885, and on the day preceding the second Monday in April, 1885, is a discrimination forbidden by the Act of Congress. The said shareholder not having deducted said *bona fide* indebtedness from any CREDITS owned by him at either of said dates."

In the brief of counsel for Whitbeck, treasurer, page 36, the proposition was stated as follows:

2nd. Under the laws of the United States and the constitution and statutes of Ohio may a stockholder in a national bank deduct from the assessed value of his shares the amount of his *bona fide* indebtedness?

THE MERCANTILE NATIONAL BANK vs. KIMBERLEY, TREASURER.

JUDGMENT—SEPTEMBER 28, 1889.

Record, p. 245.

In the second case, the Mercantile National Bank vs. Kimberley (Record p. 234-245), it was declared by the bill that the owners of shares therein named, with the amount of their shares given, made due proof to the listing and taxing officers of the city and county, that they were indebted respectively in legal *bona fide* debts in an amount exceeding the value of said shares in excess of their credits from which any portion of said indebtedness was or could have been deducted or taken under the laws of the state The bank further averred, "that the

laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him, and requires him to list for taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the state, and that under the laws of said state the owner of capital stock of your orator, is denied the right to deduct therefrom his indebtedness, but is required to list for taxation the whole number of shares owned by him, and not simply the excess value of such shares over his indebtedness, and your orator insists that such discrimination results in the taxation of your orator's stock at a much greater rate than is assessed other moneyed capital in the hands of individual citizens of the state."

The bill further averred that both said auditor and said state board of equalization refused and omitted to decrease the value of said shares by reason of said claims for deduction and thereby wholly refused to regard said Act of Congress allowing said deduction to be made. The answer of the treasurer denied all the allegations of the bill except those specifically admitted to be true. The following judgment was given on the right of the shareholders to the deductions under the issue made affirming and denying the right (Record p. 245).

"The court further find that there should be deducted from said first valuation the sum of $169,235, being the amount on which the particular shareholders named in said bill of complaint are not taxable, the same being less in amount and value than their *bona fide* debts from which they are entitled to have the same deducted, leaving the sum of $380,670, which is hereby declared to be the true valuation of the shares of said bank taxable under the Act of Congress, for said year, 1888."

Then followed the judgment enjoining the treasurer from collecting or attempting to collect any portion of said excessive tax. A similar finding and judgment was made and given against the same treasurer in favor of the complainant for the taxes of 1886, upon like allegations put in issue by answer, (Record p. 211-230, 1888.)

THE MERCANTILE NATIONAL BANK vs. SHIELDS, TREASURER.

Record p. 256.

In the third of the above cases, the bank against Shields, treasurer, (Record p. 246-256) the bill declared:

(Record p. 247) that "both said Auditor and said State Board of Equalization did fix and establish a much higher valuation for taxation upon and for the shares of capital stock of the complainant than upon other moneyed capital in the hands of individual citizens of the state, by refusing and disallowing any deduction of the *bona*

fide indebtedness of said shareholders of said capital stock from the valuation of said shares so fixed for taxation, as is allowed to individual and other citizens of the state on moneyed capital invested in *credits* hereinafter defined." The complainant further averred that by section 2730 of the Revised Statutes of Ohio it was enacted, "that the term credits shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the persons liable to pay taxes thereon, including deposits in banks, or with persons in or out of this state other than such as are held to be money as hereinafter defined when added together, estimating every claim or demand at its true value in money—over and above the sum of legal *bona fide* debts owing by such person."

The bill further averred that a large amount of moneyed capital in the hands of individual citizens of the state and of said county of Cuyahoga, in the City of Cleveland, invested in promissory notes and other legal obligations, securities, claims and demands, is by the aforesaid provision, allowing a deduction of legal *bona fide* debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares as to which no exemptions or deduction is provided for by the laws of the state, which discrimination is in direct violation of the restrictions of said section 5219 of the Revised Statutes of the United States, which provides that, "the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such state."

The bill then set out the names with the number of shares held by certain shareholders, valued at $149,340, and further averred that at the time of the return, each of the above named shareholders was indebted and owing to others of legal bona fide debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the par value of said shares, which said excess of debts over credits as aforesaid, "the said shareholders above named are entitled to have deducted from the assessed value of said shares so severally owned by them."

The bill then shows that the auditor of the county in making the duplicate for the year 1892, did deduct and abate said indebtedness of the several shareholders from the assessed value of the shares so owned by them respectively, but that afterwards, he reconsidered and reversed his action, and wrongfully added to the duplicate against the said shareholders, the entire amount of said deduction on the professed claim that such deductions were improperly allowed under the laws of said states, and assessed against the same, the rate and percentage of taxation fixed for said city, county and state for 1892, and entered the same on said duplicate, and "said defendant threatens and is about to collect by distraint or otherwise, the said taxes on said shares of stock with said deductions disallowed."

In addition to the forgoing averments a former adjudication of the right of the shareholders to the deduction claimed, is pleaded, the bill, (Record p. 250) setting out a former adjudication of the question or right of the shareholders to the deduction by the following averments:

"The complainant further avers that heretofore, to-wit, at a date prior to the April term of this court, in the year 1887, the complainant brought suit against Horatio N. Whitbeck, as treasurer of said Cuyahoga County, who then held such office, to enjoin the collection of the excessive taxation of shares of said complainant, growing out of the refusal of the taxing officers of said county to allow the deduction of *bona fide* debts of stockholders from the assessed value of said shares, said Whitbeck then representing the same interest, sustaining the same relation and charged with the same duties to the public as does the present defendant; and in said suit this complainant alleged by its bill the refusal by the auditor of said county to allow a deduction of *bona fide* debts of the shareholders from the value of shares of stock of said complainant owned in large part by the same stockholders as those above named, and in which action said treasurer of said county, admitting said refusal to allow said deduction so joined issue as to present the question of the right of said owner of said shares, to said deduction in view of the laws of Ohio, the said laws being the same as the present laws of the State and those under which the taxing officers of the said county acted in 1892 and 1893, in making assessments and in refusing deduction to be made of *bona fide* debts of stockholders from the valuation of said shares; and the complainant says that upon the issue so joined the said court at its April term, A. D. 1887, held and determined that said shareholders were by law entitled to said deduction of *bona fide* debts from the value of their said shares, to an equal amount fixed for taxation; and in said action the court gave judgment perpetually enjoining said treasurer from collecting or attempting to collect any tax or assessment on the valuation of said shares to an amount equal to said debts from which said deduction was sought to be made, and disallowed by the said auditor, on the ground that said disallowance was a discrimination against money invested in national bank shares, prohibited by the act of Congress, and the complainant alleges that said issue, so determined and adjudged was between the same parties, involved the same subject-matter and legislation and the judgment given therein remains wholly unreversed and is still in full force and operation."

To the bill containing these averments the defendant demurred (Record p. 256) on, among other grounds, the one, "that the facts stated and the allegations contained in the petition (bill) of complaint aforesaid, did not constitute a cause of action herein."

This demurrer was overruled. The following is a copy of the judgment: (Record p. 256.)

"The parties appearing by counsel, this cause came on for hearing and by consent of the parties the judgment or order *pro confesso* heretofore entered in said case, is hereby vacated and the respondent has leave to demur to said complaint; and thereupon came the respondent and demurred to the bill of complaint; and the cause came on for hearing upon said demurrer and was argued by counsel; on consideration whereof it was ordered, adjudged and decreed that said demurrer be and the same is, hereby overruled, and the defendant electing to stand by his demurrer, the court upon further hearing find the allegations of the complainant's bill to be true, and that the tax therein sought to be enjoined was illegally assessed and entered upon the

treasurer's duplicate for collection. It is therefore ordered, adjudged and decreed that the defendant and his successors in office be and they are hereby perpetually enjoined from collecting or in any way or manner attempting to collect the said illegal tax set out and particularly described in said bill of complaint."

I.

Argument upon the Legal Question Arising upon the Effect of the Former Adjudications.

In the law relating to *res adjudicata*, two things are thoroughly settled:

First, a judgment rendered by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties or their privies upon the same cause of action, so long as it remains unmodified.

Secondly, a right, question or fact, which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a court of competent jurisdiction, cannot be again drawn in question in any future action between the same parties or their privies, whether the cause of action in the two suits be identical or not.

2 Black on Judgments, sec. 504.

Hixson vs. Ogg, 53 O. S. 361.

New Orleans vs. *Citizens Bank*, 167 U. S. 371.

The Southern Pacific R. R. Co vs. *The United States*, 168 U. S. 1.

And it matters not in the least whether the question was correctly decided or not, whether the law applicable to the case was correctly determined, nor whether the question decided was one of law or fact, "whatever the question involved—whether the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment, the rule of finality is the same. The controversy has been adjudged, and once finally passed upon is never to be renewed."

Cooley Const. Lim. 47.

Hollister vs. *Abbott*, 11 Foster 448

Wells on *Res Adjudicata*, p. 5.

Yates, Exrs. vs. *Hunter*, 3 Strob. Eq. 139.

Balcum vs. *Satcher*, 51 Ala. 82

Bogarder vs. *Clark*, 4 Paige 623

"This principle pervades not only our own, but all other systems of jurisprudence, and has become a rule of universal law founded on the soundest policy."

3 Bouvier Institutes, 3115.

It had its origin in the civil law, the rule being:

Exceptionem rei judicate obstare quotics eadem quaestio inter easdem personas revocatur."

Pothier, ad D. 44 l. l. pr.
Phillimore Rom. L. 47, 53, et seq.
Brooms Legal Maxims, 328,
or, as stated by Vinnius,

"*Hae autem exceptio (rei judicatae) non aliter genti obstat quam si eadem quoestio inter eadem personas revocatur; itaque ita demum nocet si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eademque conditio personarum.*"

Vinnius, lib 4, *tit,* 13, *s.* 5.

Res judicata pro veritate accipitur.

"An issue properly determined is a bar, not only as to any dispute as to the facts, but also to any further consideration of the law bearing on the case."

21 Am. & Eng. Ency. of Law, 129.

Imrie vs. *Castrique,* 8 C. B. N. S., 405; 98 E. C. L. 403. *Southern Etc. Co.* vs. *Henlein,* 56 Ala. 368.

The rule obtains as well in an action by the government as in an action between individuals. *United States* vs. *Parker,* 120 U. S. 89.

The principle applies as well to a judgment declaring the sufficiency of certain facts to constitute a cause of action, where the court has jurisdiction to pronounce upon their sufficiency, as to a judgment upon any other question. A judgment in an action of law, or the decree in a suit in chancery, upon overruling a demurrer to the petition or bill, the ground of the demurrer being that the facts stated are insufficient to constitute a cause of action, or to entitle the party to the relief sought, is conclusive between the parties, of the sufficiency of such facts to entitle the plaintiff to judgment in any future action where their sufficiency is drawn in question. To deny the application of the principle of the thing adjudged to a question of the sufficiency of pleadings to warrant a judgment on the facts stated, is to destroy the principle itself, or engraft an exception upon a principle of universal application. Whatever the fact, or question, and however it arises, when once adjudicated, an estoppel by record at once obtains depriving a party or privy from drawing the same fact or question into further ligitation.

As said in *New Orleans* vs. *Citizens Bank,* 167 U. S. 399, "the very essence of judicial power is that when a matter is once ascertained and determined, it is forever concluded when it arises again under the same circumstances and conditions between the parties, or their privies."

It can make no possible difference what the matter is, or whether the question arises on demurrer, or issue joined upon the facts alleged.

The Whitbeck case most explicitly decided that the owner of bank shares had the right to deduct his legal *bona fide* debts from the value of his shares. The right to the deduction was one of the two principal questions certified for the decision of this court, and it was definitely answered, and a denial of the deduction was held to be a discrimination forbidden by the Act of Congress.

The fact in issue was **did the right given by the state statute to the owner of moneyed capital invested in credits to deduct his legal bona fide debts therefrom in ascertaining their value for taxation—a right denied to the shareholder as respected his shares—**

violate the restriction of the Act of Congress which permitted taxation of national bank shares only by compliance with the requirement that the taxation should be at no greater rate or valuation than that assessed upon other moneyed capital in the hands of individual citizens of the state? This was the matter upon which the plaintiff proceeded by its action, and which the defendant controverted by his answer, thereby making it the direct point or question in issue. The fact was found as averred and went into judgment. Moreover, the special master, to whom the question of the right of the shareholders to the deduction claimed was referred, reported that he found that all the shareholders but two "*were entitled* to the *deduction as charged in the bill*;" and on this report and the testimony and exhibits adduced, the court found *all the allegations* of the bill *to be true*, and followed this finding by a judgment perpetually enjoining the collection of the tax on the amount of the deduction so claimed. The ground, therefore, on which the recovery proceeded, stated in other words, was, that the statute of Ohio in permitting the deduction of *bona fide* indebtedness from credits, which in terms included all legal claims and demands, denied to the shareholder as respected moneyed capital invested in his shares, created a discrimination prohibited by the Act of Congress. This was the actual and necessary result of the finding and the decree. The judgment pronounced could not have been given without deciding the question, and hence, the judgment is to be considered as having settled that question for the parties thereto, in all future actions involving the same question. *Picket Company* vs. *Van Sickles*, 5 Wall. 592.

Having "identity of the thing demanded, identity of question and identity of the parties and their qualities, the legal presumption is established in favor of the thing adjudged," *Slocomb* vs. *Lirardi*, 21 La. Ann., 356.

The rule applies as well to decrees in chancery as to judgments at law. *Hopkins* vs. *Lee*, 6 Wheat. 113.

The finding by the court has the same effect as would have attached to a special verdict, finding all the allegations of the bill to be true, which assuredly would be the equivalent of finding all the issues with the complainant. And where all the issues are found with the plaintiff, or all the allegations contained in his bill of complaint are found to be true, which is the same thing, followed by a decree giving effect to the facts so found, the pleadings with the findings and judgment are alone to be looked to for the effect of the judgment.

It is the matter alleged by the party upon which the recovery proceeds which creates the estoppel.

Outram vs. *Moorewood*, 3 East. 346. *Cromwell* vs. *County of Sac*, 94 U. S., 353.

What the matter is and the finding upon it, and the judgment given, can only be determined by reference to the record of the court in which the proceedings were had.

"The record furnishes the only proper proof of the judgment."

Packet Co. vs. *Sickles*, 5 Wall. 580. *Wood* vs. *Jackson*, 8 Wend. 36. *Lawrence* vs. *Hunt*, 10 Wend. 85 *Porter* vs. *Wagner*, 36 O. S. 471.

No court has asserted with more distinctness than has this court, the effect of a former judgment or decree on future litigation by which

it is sought to reopen and renew the discussion of questions already in judgment. Nor has any court declared any rule more directly applicable to a case of the character of the present one than is found in *New Orleans* vs. *The Citizens Bank*, 167 U. S. 371, more particularly referred to hereafter.

In *Jeter* vs. *Hewitt*, 22 How. 364, Mr. Justice Campbell, speaking for the court as to the authority of *res adjudicata* under the civil code of Louisiana, said, what may be said under any system of procedure, "under the system of that state the maintenance of public order, the repose of society and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is the principle implanted in our jurisprudence that commentators upon it, have said, the *res judicata* renders white that which is black, and straight that which is crooked. *Facit ex curvo rectum, ex albo nigrum.* No other evidence can afford strength to the presumption of the truth it creates, and no argument can detract from its legal efficacy."

In *Aurora City* vs. *West*, 7 Wall., 82, the court, after noting the fact that courts in stating the rule, do not always employ the same language, say:

"The better opinion is that the estoppel where the judgment was rendered upon its merits, whether on demurrer, agreed statement, or verdict, extends *to every material allegation, or statement*, which having been made on one side and denied on the other, was at issue in the cause and was determined in the course of the proceedings."

And at another place in the same opinion the court say:

"Where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit and might have been presented at that trial, the matter must be considered as having passed *in rem judicatam*, and the former judgment in such case is conclusive between the parties."

In *Southern Pacific Railroad* vs. *United States*, 168 U. S. 1, the rule is stated in the following incisive language:

"A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact, once so determined, must as between the same parties or their privies be taken as conclusively established so long as the judgment in the first suit remains unmodified."

Following this clear and distinct announcement of the rule, in *Mitchell* vs. *National Bank of Chicago*, 180 U. S., 471, it was unanimously held that, "whatever may be the nature of the question presented for judicial determination, whether depending on federal, general or local law, if it be expressed by the issues made, its determination by a court having jurisdiction of the parties and of the subject matter, binds the parties and their privies so long as the judgment remains unmodified or unreversed."

In *Bryar* vs. *Campbell*, 177 U. S. 649, the court in speaking of a judgment in a state court, say:

"The judgment of the state court was *res adjudicata* of *all the issues* between the parties."

In *Sheets* vs. *Sheldon*, 7 Wall. 416, it was held the plea of *res adjudicata*, applies to every objection charged in the second suit when the objection was open to the party within the legitimate scope of the pleadings in a former one and might have been presented in it."

In *Railroad* vs. *Railroad*, 20 Wall. 137, it was held: "Where in a judicial proceeding the matter passed upon is the right under the language of a certain contract to take receipts on a railroad, the judgment concludes the question of the meaning of the contract on a suit for subsequent tolls received under the same contract."

In *Bank* vs. *Beverly*, 1 How. 134, it was held that a judgment giving construction to a will was beyond any future controversy between the parties involving such construction. The court say:

"Whatever our opinion may now be as to the facts adjudicated in the former case, the judicial power is incompetent to revise the evidence on which the decree was rendered on any ground now set up in the answer of the defendants or apparent on the present record, and they must be taken to be beyond all controversy in this or any future case between the parties."

The grounds set up in the answer in that case were as in this, those involved in the former adjudication.

If the construction of a contract or a will, is binding upon the parties in a future litigation, what doubt can there be that the construction of a statute is also binding upon parties in subsequent litigation over the same question.

In *New Orleans* vs. *Citizens Saving Bank, supra*, the question involved related to a tax, and it was there distinctly held that where the right or question upon which the exemption from taxation was claimed had been in a former suit judicially determined upon identically the same facts and circumstances as those presented in the second suit, the former judgment was *res adjudicata* and conclusive upon the parties and estopped the attempted enforcement of such taxes. In the course of an exhaustive opinion on the subject the court say:

"No principle of law is more inflexible than that which fixes the absoluteness of such a judgment upon the parties and their privies. Whether the reasons upon which it was based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness."

It was further said:

"Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection though the judgment may have been erroneous and liable and certain of reversal in a higher court;" and tnat "the estoppel extends to *every material allegation*, or statement, which having been made on one side and denied on the other, was at issue in the case and was determined therein."

The court adds:

"It follows then that the mere fact that the demand in this case is for a tax for one year and the demand in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged if in the prior cases the question of exemption was necessarily

presented and determined upon identically the same facts upon which the right of exemption is now claimed."

This statement entirely covers the present case.

Applying the principle thus so firmly settled to the question involved in the present controversy, we at once reach a decisive result.

By the record in the first, or Whitbeck case, the judgment was given upon the issues made by the bill and answer and the master's report, the court finding all the allegations of the bill to be true. The master's report also found the right to the deduction. In the second, or Kimberley case, the judgment was given upon like issues by bill and answer with a specific finding that the shareholders were entitled to the deductions claimed; and in the third, or Shields case, the only question being the right to the deduction, final judgment was given on overruling the demurrer to the bill, the treasurer electing to stand by his demurrer.

Opposing counsel advise us that in their brief they shall put their denial of the estoppel, which we claim arises from these judgments, on two grounds; first, that the decision of this court in the Whitbeck case, being upon a false assumption of the law, cannot remain *res adjudicata* in future cases involving taxes. Secondly, that the principle of *res adjudicata* cannot apply, for while the case is between the same parties, it does not involve the same subject matter. Neither of these positions has the slightest foundation to rest upon.

It is a fundamental maxim of the law that a man shall not be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et eadem causa. Interest republicae ut sit finis litium.*

Broom, in speaking of this general maxim, says:

"It has, as may readily be supposed, a wide application; it in fact embraces the whole doctrine of estoppel which is obviously founded in common sense and sound policy, since, if facts once solemnly affirmed to be true were to be again denied, whenever the affirmant saw his opportunity, there would never be an end to litigation and confusion," Brooms Legal Maxims 343.

The principle *transit in rem judicatam* proceeds on the incontestable assumption that the judgment speaks the truth as respects the right, question or fact involved in the issue determined.

As said by Peckham J., in *Sheldon* vs. *Edwards*, 35 N. Y. 289.

"Of what benefit to either party to try an issue if the finding is of no consequence and if the judgment thereon have no effect. The law presumes it was properly tried, that all the facts bearing upon the issue were fully and thoroughly presented."

Whether the question was well or ill decided is wholly irrelevant.

Whether the former case was decided upon a false or correct assumption of law does not in the least affect the verity of the thing adjudged, or the operation and effect of the judgment so long as it remains unmodified. It conclusively speaks the truth upon every issue covered by the finding. *Interest republicae, res judicatas non rescindi.*

"Matters once determined in a court of competent jurisdiction may never again be called into question by parties or privies against objection though the judgment may have been erroneous and liable to, and certain of, reversal in a higher court."

New Orleans vs. *Citizens Bank, supra.* Bigelow Estoppel 3d. ed. Outline p. p. lxi, 29, 57, 103.

The construction placed upon a contract, or will, or statute, is conclusively binding on the parties in all future litigation involving the construction of the same contract, will or statute.

Bank vs. *Beverly*, 1 How. *supra*. *Railroad* vs. *Railroad*, 20 Wall. *supra*.

This doctrine is universally recognized in all tribunals where the common law prevails.

II.

The second of the above propositions of our adversaries is equally ill founded. The subject matter of the two suits is precisely the same. The claims of the two cases, the former and the present one, are, in the strictest sense identical. The statutes upon whose effect and operation the claim arises are literally the same in the two cases. The right to a deduction of the legal *bona fide* debts from the assessed value of national bank shares, was the question involved in the former adjudication and wholly depended on the construction of the statutes. It is identically the same question that is involved in the present controversy arising under the same legislation without change of a line or word. It is true that the tax sought to be enjoined is for a different year from that involved in the former suits, but the right thereto, and the right of the shareholder's exemption therefrom, depend upon the identical question that passed into the former judgment.

The only difference between the question here and the one decided in *New Orleans* vs. *Citizens Bank, supra*, is, in that case the right to the exemption arose out of a contract or obligation created by a state statute which a later statute sought to annul. Here the right to exemption arises out of the restriction of the Act of Congress with which the state legislation in providing for taxing the share capital at its full value, has been adjudged to be in conflict.

The remedy in each case being to restrain the operation of the state statute to the extent that it interferes with the rights of the bank so created.

Where a state statute is claimed to conflict with an Act of Congress the fact is ascertained by a comparison of the two statutes, and where it is asserted that state legislation on the subject of taxation results in its operation in taxing federal securities beyond, and in disregard of, the restrictions Congress has imposed as a condition upon which the securities may be taxed at all, the pleading by which the question is raised must necessarily set up by proper averments the state statute authorizing the tax with the claim of its infringement of the particular Act of Congress whose provisions are claimed to be violated, and when this is done and the court decide that such taxation is unauthorized, or is prohibited by the Act of Congress, and such decision is carried into the decree enjoining the enforcement of the state statute, as respects such securities, that decree forever binds the parties.

Where all the issues are found with the party, a judgment on the verdict, or special finding, becomes *res adjudicata* as to every one of such issues, no matter what their character may be.

Bryar vs. *Campbell*, 177 U. S. 649. *Glen* vs. *Summer*, 132 U. S. 152. *Sites* vs. *Haverstock*, 23 O. S. 626. *Life Insurance Co.* vs. *Sutphin*, 35 O. S. 360.

In *Flourney* vs. *Lastrapes*, 131 U. S. Appendix CLXL., the court held:

"A general verdict 'for the defendant' is equivalent to a special verdict on each and every one of the issues tried, and authorized any judgment that could be entered on such a finding."

In *Insurance Co.* vs. *Sutphin*, *supra*, the trial court found the issues, five in number, for the defendant, when only one should have been found in his favor. On error the judgment was opened and the finding on the four issues was vacated by the Supreme Court, for the reason if carried into judgment plaintiff would be estopped from thereafter asserting any right concluded thereby. When in the former cases the court found all the allegations of the bill to be true and carried such finding into the decree, the judgment became *res adjudicata* as to every material allegation of the bill. This proposition is so axiomatic that its statement seems an idle ceremony. Moreover, a judgment given on a master's report finding a particular fact or determining a particular question, as in the Whitbeck case, is conclusive of such fact or question in future controversies involving the same fact or question.

"The finding of a referee, like the verdict of a jury, constitutes an essential part of the record of the case. Such finding having gone into judgment is conclusive as to the facts found in all subsequent controversies between the parties.....Every defense requiring the negation of this fact is made and overturned by that adjudication."

Mr. Justice Field, in *Lumber Company* vs. *Buchtel*, 101 U. S. 653.

The question involved arising out of discriminatory legislation is not and cannot be affected by any outside conditions so long as the statutes remain the same. The former question decided was not what amount of debts or credits may exist, or may have existed, in any particular year, nor whether the owner of credits may have availed himself of the right to deduct his debts therefrom in order to fix their valuation for taxation; but the question was, has the state, in not providing for a like deduction of debts from the value of national bank shares, complied by its legislation, with the condition upon which Congress has authorized the taxation of moneyed capital so invested. It was held in the former cases that it had not, and consequently that the tax was void. The statute having the same operation from year to year it is difficult to see how conditions of debts or credits for particular years can affect its operation as respects its discriminatory character.

But if we look at the returns of moneyed capital for taxation made in Ohio during the last two decades reported yearly to the state auditor by the various county auditors of the state, and by the state auditor tabulated and bound in book form as required by the statute, we find that credits—declared to embrace all legal claims and demands—after deduction of all legal *bona fide* debts therefrom, more than double in amount all other moneyed investments in the state of every character, including money invested in bank shares. We need not, however, dis-

cuss the effect of this here, as it is not involved in the questions here made.

It having been held in 1887, 1888, 1889, and 1893, by the Circuit Court, that the state statute in its operation discriminated against national bank shares, the same result must obtain so long as the statute remains unchanged. So long as it does, it necessarily has the same operation between the parties. This proposition ought not to require discussion in view of its self-evident character.

But the result or judgment in *The Bank* vs. *Shields*, Treasurer, decided in 1893, and in the Kimberley case in 1889, utterly destroys the claim of our adversaries, if it otherwise has the least merit, that because the Whitbeck case was decided under an alleged misapprehension of the meaning of the Ohio statute that the judgment of the Circuit Court of Appeals was, therefore, wrong. No such claim affects these cases. In the Shields case the defendant elected to stand by his demurrer to the bill, which the court overruled, and in which case on further hearing the court found all the allegations of the bill to be true and gave judgment. Every material allegation of fact contained in the bill went into judgment—a judgment as effective in its efficacy and operation as if given on an express denial of all the averments of the bill.

The right to the deduction was the only question in the case. It was the very substance of the issue. It arose upon identically the same legislation as does the present suit, and, as said in *New Orleans* vs. *Citizens Bank*, 167 U S. 391:

"In the pleadings there was nothing which justified the decree, or *to which it was responsive*, except the exemption of the bank."

And as there further said, "it was based on the identical claim of exemption now asserted by the bank in order to defeat the taxes now in question."

If the bill had been dismissed on the merits what doubt would exist that the bank would be estopped from renewing the discussion of the questions therein at issue?

That a judgment following the overruling of a demurrer is as conclusive as if given upon an issue joined upon all the facts is well settled law.

In *Bissel* vs. *Spring Valley Township*, 124 U. S. p. 232, this court speaking to the point by Mr. Justice Field, said:

"The law on this subject is well stated in Gould's Treatise on Pleadings, a work of recognized merit in this country, as follows: 'A judgment rendered upon a demurrer is equally conclusive (by way of estoppel) of the facts confessed by the demurrer as a verdict finding the same facts would have been. Since they are established as well in the former case as in the latter by way of record. And facts thus established can never afterwards be contested between the same parties or those in privity with them.'"

To the same effect is *Clearwater* vs. *Meridith*, 1 Wall. 26. *Goodrich*. vs. *The City*, 5 Wall. 566. *Gould* vs. *R. R. Co.*, 91 U. S. 526.

Therefore, whatever view is taken of the decree in the Whitbeck case, there cannot be the slightest doubt of the correctness of the decision of the Circuit Court of Appeals as to the effect of the decree in the Shields case. To hold otherwise is to overturn a uniform line of deci-

sions by which it is held that where parties have had their day in court, the question involved in the issue and carried into judgment must as respects parties or privies, be regarded as conclusively settled for all time.

The former judgment has been held a bar by the judgment in the Shields case.

Besides the general question of the effect of the former adjudication pleaded, it is distinctly found in the Shields case, and the finding was carried into the decree, that the Whitbeck case adjudicated the question of the right of the shareholders of the bank to the exemption claimed. We direct particular attention to the following averment in the Shields case, Record p. 250:

"The complainant further avers hereto, to-wit.: At a date prior to the April term of this court in the year 1887, the complainant brought suit against Horatio N. Whitbeck, as Treasurer of Cuyahoga County, who then held such office, to enjoin the collection of the excessive taxation of shares of said complainant, growing out of the refusal of the taxing officers of said county to allow the deduction of *bona fide* debts of stockholders from the assessed value of said shares, said Whitbeck then representing the same interest, sustaining the same relation and charged with the same duties to the public as the present defendant; and in said suit this complainant alleged by its bill the refusal by the then auditor of said county, to allow a deduction of *bona fide* debts of the shareholders from the value of shares of stock of said complainant owned in large part by the same stockholders as those above named, and in which action said treasurer of said county, admitting said refusal to allow said reduction so joined issue as to present the question of the right of said owners of said shares, to said deduction, in view of the laws of Ohio, the said laws being the same as the present laws of the state and those under which the taxing officers of said county acted in 1892 and 1893, in making assessments and refusing deductions to be made of *bona fide* debts of stockholders from the valuation of said shares; and the complainant says upon the issue so joined, the said court at its April term, A. D. 1887, held and determined the said shareholders were by law entitled to said deduction of *bona fide* debts from the value of their said shares, to an equal amount fixed for taxation; and in said action the court gave judgment perpetually enjoining said treasurer from collecting or attempting to collect any tax or assessment on the valuation of said shares to an amount equal to said debts from which said deduction was sought to be made and disallowed by said auditor, *on the ground that said disallowance was a discrimination against money invested in national bank shares, prohibited by the Act of Congress;* and the complainant alleges that said issue so determined and adjudged, was between the same parties, involved the same subject matter and legislation and the judgment given therein remains wholly unreversed and is still in full force and operation."

This averment was found to be true—every allegation of the complainant's bill was found to be true.

We, have, therefore, in addition to the usual effect given to the former adjudication of the same question a finding declaring that the former adjudication involved the same question carried into the later judg-

ment—a judgment finding the question to have been concluded by a former judgment.

From this it indubitably follows that the decree of 1893 was a conclusive adjudication of the right of the complainant to the relief here sought. The court could not have given the judgment in the Shields case—it was an impossibility—without finding that the section of the Ohio statutes defining credits by limiting them to what one owns less his *bona fide* debts, created a discrimination prohibited by the Act of Congress under which the right to tax national bank shares was created. The question was involved and necessarily decided. It "was a fact requisite to be proved and established in order to obtain the judgment; hence the question of right determined has passed in *rem judicatam.*"

Blair vs. *Bartlett*, 75 N. Y., 150.

Grant vs. *Ramsey*, 7 O. S., 157.

It was the matter upon which we proceeded by our action and which the treasurer controverted by his demurrer. *Taylor* vs. *Dustin*, 42 N. H., 495.

Of the fact that the statute defining credits, section 2730, is the same now as when the former decree was given, the court will take judicial notice.

Hanley vs. *Donoghue*, 116 U. S. 1.

Gormley vs. *Bunyan*, 138 U. S. 623.

The same is the fact as to section 5219 of the Revised Statutes of the United States defining the restrictions under which national bank shares may be taxed by or under state authority. There has been no change in that section and the master expressly finds to be true the averment contained in both bills, that:

"In said year, 1897, a large amount of moneyed capital in the hands of individual citizens of the state invested in promissory notes and other obligations and credits, was by section 2730 of the Revised Statutes of Ohio authorized to be exempted from taxation through the deductions therefrom of legal *bona fide* debts." (Record 51.)

Having the same legislation now as when the former decree was rendered defining the exemptions from taxation, and their extent, placed on moneyed capital in the hands of individual citizens of the state; having the same averments in the two bills; and having a decree adjudging those exemptions to be such as to create a discrimination against capital invested in national bank shares, and the declared consequences resulting from such discrimination, to be "that the owners of such shares are entitled to have a deduction of their indebtedness made from their assessed value as in the case of other moenyed capital," any process of reasoning that works out the conclusion that we are not now entitled to the same judgment we formerly received, we respectfully submit, must necessarily be fallacious.

Without prolonging a discussion already too protracted, we respectfully submit that the former adjudications relied on in support of the judgment of the Circuit Court of Appeals under review are decisive of the correctness of that judgment.

Respectfully submitted,

W. W. BOYNTON,
Solicitor for Appellee.

No. 227.

Add'l. Brf. of Boynton for Appellee.

Filed Mar. 15, 1902.

No. 227.

Supreme Court of the United States.

MARCELLUS A. LANDER, TREASURER,
vs.
MERCANTILE NATIONAL BANK.

ADDITIONAL BRIEF OF APPELLEE.

IN RESPONSE TO BRIEF OF APPELLANT.

I.

The brief of the appellant having reached us since the printing of our original brief, we beg the court's leave to direct attention to much of its contents which we regard as matter wholly irrelevent to the questions to be decided.

The first twenty-five pages of appellant's brief are devoted to an endeavor to establish two facts; first, that in Ohio legal *bona fide* debts cannot be taken from the value of national bank shares; and second, that inasmuch as the Supreme Court of Ohio has held that such deduction could not be had, that decision will be followed by this court, whether right or wrong. The first of these two propositions is not involved in the case, as in the Circuit Court of Appeals that question was by us distinctly waived, the appellee deeming the former judgments pleaded to be fully adequate for the protection of its stockholders as to the deductions claimed.

The second of the above propositions, that this court is bound by the state adjudications, is not supported by a single authority, and is directly in conflict with a long line of decisions of this court. The question is not whether the laws of Ohio authorize the deduction of debts from the value of bank shares. It is very clear that they do not. The question is; because of the fact that they do not, is the Act of Congress permitting their taxation under the restriction as to rate and valuation to that of other moneyed capital in the hands of individual citizens of the state, violated by the provision of the Ohio statute permitting *bona fide* debts to be deducted from all legal claims and demands under the denomination of credits, such deduction being denied to national bank shares. This is a purely federal question and the decision of it by a state court does not fall within the rule adopted in this court, of following the decision of the Supreme Court of the state on the construction of state statutes. The bare statement of the question at once shows that it belongs to the class where the federal courts are the final arbiters, and where they dispose of the question without regard to the state holding.

II.

The next question discussed by learned counsel in their brief (commencing on page 26) is as there stated, *an examination of the findings of fact as bearing upon the question of discrimination against bank shares.* Ten pages are devoted to a discussion of the rules for the valuation of bank shares. In view of the fact that we made but two questions for the decision of the Circuit Court of Appeals, the only ones they adverted to in their opinion;—the one relating to the jurisdiction of the State Board of Equalization for incorporated banks to take the action had upon the 4th day of December, resulting in increasing the valuations fixed by the county auditor on the shares of appellee's stock, in the sum of $123,000 without notice to the bank; the other relating wholly to the effect of the former adjudications determining the right to reduce the valuation of the shares by taking *bona fide* indebtedness therefrom; we are at a loss to see the relevancy to either of these questions of any action taken by the assessing officers relating to the mode of estimating the valuation of the bank shares.

If the board at its final meeting was without jurisdiction of the parties as held by the Supreme Court of Ohio, its action was void. And to determine that question, the mode of the valuation of property for taxation by the assessing officers, is wholly irrelevant.

III.

The third point made in appellant's brief (commencing on page 37), relates to the failure to give the officers of the bank or its stockholders notice of the meeting of the State Board of Equalization of December 4th, at which action was to be taken on the county auditor's valuation. We desire at the outset to correct a palpable error that opposing counsel have fallen into. They open the discussion of the third point by saying.

> "If the complainant bank had not the right to have its shareholders' debts deduced from the value of their bank shares before returning the same for taxation, but the auditor of Cuyahoga County had so permitted them to be **deducted** when the state board of equalization for banks added to the bank's returns a part of the debts so illegally deducted and did not give actual notice to the bank, it fully complied with the law."

There is an assumption here wholly at variance with the truth. The County Auditor had not made and did not make any deduction of debts in fixing the valuation of the shares. The valuation was made by him without regard to debts. Moreover, as opposing counsel must know, but seemingly have overlooked, the county auditor did not allow any deductions for the year 1897. This is our complaint for which we are seeking relief, so that the statement above referred to, that the state Board of Equalization in increasing the County Auditors' valuation only restored a part of the deduction wrongfully made, is wholly gra-

tuitous without a semblance of support from actual facts. The contention that the statutory notice to the bank and its stockholders, that the board would meet on the third Tuesday of June to hear complaints and to equalize the value of the shares, bound the bank to find out when the board would re-assemble from their *sine die* adjournment, is indeed novel. Its absurdity is so gross as to permit of no discussion. Among the vast number of cases cited to the proposition of opposing counsel that the statutory notice fixing the time and place of the meeting of the board, namely, at the State Auditor's office on the third Tuesday of June is sufficient notice of the action taken or to be taken on December 4th, not even one can be found that gives the slightest support to the proposition. In every one of the cases cited, and especially in those from Ohio, the action was taken on the day appointed by the statute, or on some day certain to which an adjournment was definitely made. An argument to show that such authorities do not apply to a meeting not on the day apopinted by the statute held at the mere call of a member of the board and on a day of which no notice whatever was given to the parties interested in the action to be taken, would be an idle ceremony. The fact should not be overlooked, nor its force undervalued that this December meeting when the usurped action was taken, was more than a month after the law required the duplicate to be in the treasurer's hands containing the list of the taxes to be collected. The contention that the bank was not damaged by want of notice because the bank shares were not assessed at more that the constitution and laws of Ohio require, we have heretofore shown to be wholly untenable. The Master's finding shows that in the taxing district where the bank is located all moneyed capital is taxed at sixty per cent. of its actual value and the necessary rate fixed to secure the money needed to meet the public requirements. And no injustice is done in taking sixty dollars as the actual value of one hundred dollars, because to raise the amount required the rate is correspondingly increased. At sixty per cent. valuation the rate in Cuyahoga county is three cents on the dollar. If the valuation was taken at one hundred dollars the rate to raise the same amount of money would be but one cent and eight mills. Where taxes are illegally levied the Revised Statutes of Ohio, section 5848, authorize an action to enjoin collection. And it has been repeatedly held that the federal courts would enforce this provision.

Cummings vs. *National Bank* 101 U. S. 157.

Grether vs. *Wright*, 23 C. C. App. 498.

In *Champaign County* vs. *Smith*, 7 O. S. 42 the court held the statute requiring notice to be mandatory and that the action of the auditor without notice was void, because of the want of jurisdiction of the party affected thereby. The same contention of the appellant was overruled in the thirteen cases brought in the state courts of Cuyahoga County to enjoin the action of this very board at its December 4th meeting, and the tax on the addition was perpetually enjoined.

Opposing counsel admit that "if the issues of law and fact in the Whitbeck case were the same as in the case at bar, then the matter adjudicated in the Whitbeck case is *res adjudicata* as to the case at bar," (brief p. 50). But they draw a distinction between the two cases from the circumstance that the tax sought to be enjoined was levied

in a different year and they cite Iowa and Kentucky cases to support the case made. This point was distinctly settled by this court in *New Orleans* vs. *Citizens Bank*, 167 U. S. 371, and adversely to the claim now made. They further contend that the cases are different because in the pleading of the Whitbeck case it was said that the laws of Ohio authorized and permitted the owner of credits to deduct therefrom all debts owing by him and required him to list for taxation only in excess of his credits over his indebtedness. The bill in the Whitbeck case set out the Ohio Statute and referred to the Act of Congress to which the state statute was claimed to be in conflict, and such conflict was found and adjudged. On reference, the master found that by reason of the legislation bearing on the subject the owners of shares were entitled to the deductions as claimed in the bill. The court on final hearing found the entire issue with the bank. The bill in the present case sets out the same statute and makes the claim of discrimination and the further claim that the question is concluded by the former adjudication. But the statute of Ohio, section 2730, does allow the deduction of all legal *bona fide* debts from credits. This is its language, but it provides that in determining what are legal *bona fide* debts, obligations to mutual insurance companies, unpaid subscriptions to capital stock of any joint stock company and subscriptions to religious, scientific, literary or charitable purposes shall not be considered legal *bona fide* debts. The effect of the exclusion is to declare that these charitable obligations are not *bona fide* debts within the intendment of the statute. The court found both in the Whitbeck case and in the Shields case, that allowing debts to be taken from credits for the purpose of determining their value for taxation, a right denied to national bank shares, violated the restriction of the act of Congress. But counsel make a very curt disposition of the decree and judgment in the Shields case. They say in effect (brief p. 63) that if the decree in the Whitbeck case was founded on a misconception of the Ohio statutes, the decree in the Shields case cannot avail, as the decision in the Whitbeck case was the basis of that decree. We have shown in our original brief that if this contention were true, the conclusion is entirely ill founded. It matters not in the least what view the court took of the law, the final judgment concludes the question decided in every future litigation between the parties involving the same question. It may be true that the Circuit Court in giving judgment in the Shields case was of the opinion—not a violent one—that the Whitbeck case was an authority for its judgment. Whether such was its opinion is matter wholly irrelevant to the effect of the judgment. But there is one feature of the Shields case that counsel overlook, although brought pointedly to their attention by the record and by the opinion of the Circuit Court of Appeals, and that is, that the judgment in the Shields case ascertained and included the fact that by the Whitbeck decree the right to deduct debts from the value of bank shares was put directly in issue and was as conclusively determined.

We shall only allude to one other statement of counsel. They say (brief p. 56) that they wish to call the attention of the court to what the Supreme Court of Ohio say about the plea of *res adjudicata*. They then quote from the opinion in the Chapman case the following language:

"But it is said by counsel for the bank that the question is *res adjudicata,* and has been determined and settled by the Supreme Court of the United States in *Whitbeck* vs. *Mercantile National Bank,* 127 U. S. 193."

The court then comment on the decision. The least attention to the questions involved in that case will show that the court misused the term *res adjudicata.* The term *stare decisis,* would have been more appropriate, as in that case not even the slightest claim was made that the question had been formerly settled between the parties to that case. What the court obviously meant was that counsel claimed that the Whitbeck decision was conclusive, as a binding authority, of the issues in the Chapman case.

Finally, our adversaries fall into the error pointed out in our main brief regarding what this court said in the opinion in the Whitbeck case, and its affirmance of the judgment of the Circuit Court as the matter that creates the estoppel. The estoppel as we have shown is ascertained and wholly so, by an examination of the pleadings in the former cases and the judgments or decrees entered thereon in the Circuit Court.

Respectfully submitted

W. W. BOYNTON.